Supreme Court, U.S.
FILED
JUN 17 1993
OFFICE OF THE CLERK

No. 92-1842

In The

Supreme Court of the United States

October Term, 1992

NORMAN DOE,

Petitioner,

vs.

ENTERGY SERVICES, INC.,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Louisiana

BRIEF IN OPPOSITION

ELENA C. GOLETZ
Counsel of Record
225 Baronne Street, 26th Floor
New Orleans, Louisiana 70112
Telephone: (504) 569-4375

MICHAEL G. THOMPSON
On the Brief

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

LIST OF PARTIES

Pursuant to Supreme Court Rule 29.1, the Respondent, Entergy Services, Inc. herewith states that it is a wholly owned subsidiary of Entergy Corporation, 225 Baronne Street, New Orleans, LA 70112.

Otherwise, the Petitioner's List of Parties on page ii of the Petition for Writ of Certiorari is an accurate representation of the interested parties to this dispute.

TABLE OF CONTENTS

Page

LIST OF PARTIES i

TABLE OF AUTHORITIES iii

STATUTES INVOLVED 1

COUNTERSTATEMENT OF THE CASE 3

JURISDICTION 6

SUMMARY OF THE ARGUMENT 7

REASONS FOR DENIAL OF THE WRIT 7

Certiorari Should Be Denied Because The Petitioner Has Not Met His Burden Of Establishing That This Court Has Jurisdiction 7

1. Petitioner's failure to raise federal issues in the lower court should render the matter unreviewable 7

2. The case was solely decided on state law and as such should not be reviewed as the matter rests on state grounds alone 8

Certiorari Should Be Denied Because The Petitioner Has Not Been Deprived Of Due Process .. 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES:

Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 8

Clark v. Jeter, 486 U.S. 453 (1988) 8

Illinois v. Gates, 462 U.S. 213 (1983) 8

Illinois v. Rodriguez, 497 U.S. 177 (1990) 8

Massey v. G. B. Cooley Hos. for Retarded Citizens, 593 So. 2d 460 (La. App. 2d Cir. 1992), *writ granted*, 596 So. 2d 198 (La. 1992) 4

Michigan v. Long, 463 U.S. 1032 (1983) 8, 9

Paul v. Davis, 424 U.S. 693 (1975) 11

Smith v. Cole, 553 So. 2d 847 (La. 1989) 4

STATUTES:

Federal Rules of Civil Procedure, Rule 12(b)(6) . 1, 4, 11

Louisiana Code of Civil Procedure, Article 921 ....1, 10

Louisiana Code of Civil Procedure, Article 927 .....1, 3

Judiciary and Judicial Procedure, 28 U.S.C. § 1254(1) 2, 6

Judiciary and Judicial Procedure, 28 U.S.C. § 1257 ..... 2, 6, 8

STATUTES INVOLVED

Louisiana Code of Civil Procedure, Article 921, which reads as follows:

> Art. 921. Exception defined
>
> An exception is a means of defense, other than a denial or avoidance of the demand, used by the defendant, whether in the principal or an incidental action, to retard, dismiss, or defeat the demand brought against him.

Louisiana Code of Civil Procedure, Article 927, which reads in part as follows:

> Art. 927. Objections raised by peremptory exception
>
> The objections which may be raised through the peremptory exception include, but are not limited to, the following:
>
> (1) Prescription;
>
> (2) Res judicata;
>
> (3) Nonjoinder of an indispensable party;
>
> (4) No cause of action; and
>
> (5) No right of action, or no interest in the plaintiff to institute the suit.

Federal Rules of Civil Procedure, Rule 12, which reads in part as follows:

> Rule 12. Defenses and Objections - When and How Presented - By Pleading or Motion - Motion for Judgment on Pleadings
>
> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading,

whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) **failure to state a claim upon which relief can be granted** . . . (Emphasis added)

28 U.S.C. § 1257, which reads in part as follows:

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1254, which reads as follows:

§ 1254. Court of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

COUNTERSTATEMENT OF THE CASE

This case arises out of the dismissal of petitioner's lawsuit by the Civil District Court of the Parish of Orleans on the basis of a Louisiana procedural mechanism referred to as a peremptory exception of no cause of action. The trial court concluded on the exclusive basis of Louisiana state law and long established Louisiana procedural rules that the petitioner's suit should be dismissed and the defendant's exception should be granted as no positive law of any kind recognized in the state of Louisiana would afford any relief to the plaintiff.

In reaching its conclusion, the trial court, as required by Louisiana Code of Civil Procedure Art. 927, was bound to consider all of the facts alleged by the petitioner as true for the purpose of trying the exception. In Louisiana, the peremptory exception of no cause of action tests solely the legal sufficiency of the petition and does not entertain the presentation of any factual evidence other than the facts as alleged by the petitioner. The Fourth Circuit Court of Appeal aptly summarized the procedural construction applicable in a peremptory exception of no cause of action. The court described the process by which

the exception is tried on the face of the pleadings accepting the facts alleged in the petition as true. Petitioner's Brief, Appendix C at 10a; *Smith v. Cole*, 553 So. 2d 847, 855 (La. 1989). In fact, it is also commonly accepted that to do substantial justice, any doubt must be resolved in favor of the sufficiency of the petition. *Massey v. G. B. Cooley Hos. for Retarded Citizens*, 593 So. 2d 460, 462 (La. App. 2d Cir. 1992), writ granted 596 So. 2d 198 (La. 1992). The peremptory exception of no cause of action is analogous to a motion to dismiss based on Federal Rule of Civil Procedure 12(b)(6).

The dismissal of the petitioner's suit by the trial court was subsequently affirmed by the Louisiana Fourth Circuit Court of Appeal. In its decision, which is reported at 608 So. 2d 684 (La. App. 4th Cir. 1992), the Fourth Circuit clarified the effect of the lower court's decision.

The appellate court recognized that the peremptory exception granted by the trial court did not expressly permit amendment. The Fourth Circuit discussed the propriety of the trial court not explicitly permitting amendment and concluded that while amendment is mandatory when the grounds of objection may be removed by amendment, in this case amendment would not be permitted when that exercise would be vain as per Louisiana civil procedure and jurisprudence.

However, it must be noted that, despite the clarity of statement by the Louisiana Fourth Circuit Court of Appeal in affirming the lower court's dismissal with prejudice, petitioner has filed an amendment to his initial petition. *See* Respondent's Brief, Appendix at 4. The amended petition was filed on December 4, 1992, and

remains undecided at this time. The amending petition reiterates many allegations previously articulated in the first petition. By amending his petition, Doe seeks to relitigate his case in state court while simultaneously applying for review by this Honorable Court. Further, the amendment of the petition procedurally flaws the petitioner's attempt to seek review by this Honorable Court in that the petitioner has thereby impaired the finality of the judgment before this Court. In fact, because of his filing an amendment in state court, petitioner does not have a valid final judgment and should be required to continue with his case in the state courts of Louisiana. The respondent, herein, has been faced with what is tantamount to vexatious litigation by petitioner's filing a procedurally improper amendment without leave of court. Respondent will consider filing another peremptory exception not only reurging a peremptory exception of no cause of action but also asserting res judicata. The petitioner's amended petition vitiates the finality of the prior decision which was affirmed by the Louisiana Supreme Court in its denial of certiorari.

Neither the decision by the Civil District Court for the Parish of Orleans, nor the Fourth Circuit's affirmance thereof, address in any way the issue of personal security or the abridgement or violation of due process rights. The absence of any discussion of the rights of personal security or the violation of due process results from the absence of those issues in the petition. These issues were never raised by petitioner who at this point in the case attempts to create a federal issue of law where none was ever previously asserted at any prior stage of the proceedings.

JURISDICTION

The petitioner erroneously states that jurisdiction is properly sought under the terms of 28 U.S.C. § 1254(1). Petitioner's reliance on § 1254(1) is not appropriate insofar as that section is the applicable jurisdictional basis for review of federal cases decided by a federal appellate court. The matter which petitioner presents before this Court has been adjudicated by the Louisiana Fourth Circuit Court of Appeal, and the Supreme Court of the State of Louisiana denied a writ of certiorari. The case before this Court has followed a traditional procedural path through the avenues of Louisiana's state courts. As federal courts have never been involved in any aspect of the case, the jurisdictional basis invoked by the petitioner is inapplicable and petitioner's jurisdictional basis is misstated.

However, for the sake of completeness, respondent acknowledges that federal jurisdiction may be appropriate in a case that was initiated in a state court and ultimately decided by the highest court of a sovereign state. Jurisdiction in cases litigated in state court may, under proper circumstances, be asserted under 28 U.S.C. § 1257. Petitioner raised issues of the constitutionally protected right of personal security and the violation of due process for the first time in his petition for review by this Honorable Court. However, it should be noted that the instant case should not be reviewed by this Court because petitioner failed to raise any issue of federal due process at any other stage of the proceedings. Hence, under generally accepted rules, the matter before this Court is not appropriately reviewable in that petitioner's

claim of infringement of constitutionally protected due process rights is not timely.

SUMMARY OF THE ARGUMENT

The petitioner's application for review should be denied on the basis of (a) failure to raise any federal issues in a timely manner, (b) lack of finality of a judgment at the lower court, and (c) adequate and independent state law to support the decision at the lower court.

Additionally, petitioner has failed to demonstrate any infringement of federal due process rights.

REASONS FOR DENIAL OF THE WRIT

Certiorari Should Be Denied Because The Petitioner Has Not Met His Burden of Establishing That This Court Has Jurisdiction.

1. Petitioner's failure to raise federal issues in the lower court should render the matter unreviewable.

Prior to seeking a writ of certiorari, petitioner's lawsuit neither alleged that his right to a security interest had been impinged nor did he claim any violation of a constitutionally protected right to due process. These claims are de novo and therefore should not be considered on the basis of lack of timeliness. In essence, no federal claim was presented at any stage of the proceedings. The lack of timeliness in raising a federal question should render the petitioner's case unreviewable by this Court. The failure to raise the federal issues earlier in the

proceeding should result in the preclusion of review. Traditionally, it has been held that this Court will not consider for review federal issues that were not brought at the court below. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 72 (1988); *Clark v. Jeter*, 486 U.S. 453, 460 (1988).

It is well settled that in reviewing judgments issued by state courts under the jurisdictional basis of 28 U.S.C. § 1257, this Court will not generally entertain claims that were not raised or otherwise addressed at the lower court. *Illinois v. Gates*, 462 U.S. 213, 218 (1983). As the petitioner had not raised any federal issues at the lower court, none of the prior decisions rendered in this matter even considered a federal question. Hence, this Court has no jurisdictional basis to support review of matters not presented to the court below. The federal questions which are now urged are simply not timely.

2. The case was solely decided on state law and as such should not be reviewed as the matter rests on state grounds alone.

Petitioner's lack of jurisdiction is supported by other bases which are well established. The Court has long held that review of a state case will not be appropriate when the state court's decision is based on adequate and independent state grounds. A state court decision that is based on state law that is both adequate and independent will not be reviewed by this Court. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983); *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990).

The Court has acknowledged its respect for the independence of the sovereign state in matters where a state court decision has strictly interpreted and applied state law. *Michigan v. Long*, supra at 1041.

In the case before the Court, the decision of the Louisiana Fourth Circuit Court of Appeal rested entirely on an interpretation of the Louisiana Civil Code and Louisiana statutory law. The issue correctly decided by the Court of Appeal pertained to an employer's right to determine the contents and maintenance of employee personnel files. The Fourth Circuit unequivocally concluded that no clear statutory rules had been enacted by the state legislature with regard to the subject of maintenance and contents of an employer's personnel files on employees. Petitioner's Brief, Appendix C at 9a. However, consistent with the Louisiana Civil Code, the court rooted its decision in custom.

The Court of Appeal stated:

> It is also custom and, therefore, law that employers are entitled to document in an employee's personnel file the occupational conduct/misconduct, reprimands, counseling sessions, violations, complaints etc. of the employee.

Petitioner's Brief, Appendix C at 9a.

Clearly, the court's decision was based on the application of state law and no reference to or reliance on federal law was invoked. In reaching its decision entirely on Louisiana codal, statutory and decisional law, the adequacy and independence of the state court decision is unquestionable. Hence, this Court should recognize that the case

presented is purely a matter of state law and is outside of the scope of recognized federal jurisdiction.

Certiorari Should Be Denied Because The Petitioner Has Not Been Deprived of Due Process.

While the petitioner's application for a writ of certiorari is procedurally flawed in more than one aspect, this Court should not review this case in that petitioner has not been deprived of due process. Essentially, in granting the peremptory exception at the trial court, the sufficiency of the plaintiff's pleadings was tested. The purpose of the Louisiana Rule of Civil Procedure creating peremptory exceptions is to provide a defendant in a civil action with a means to defeat the demand brought against him. La. Code of Civ. Proc. Ann. Art. 921 (West 1993). Under Louisiana procedural rules no evidence of any kind may be introduced during the trial of the peremptory exception. The pleadings filed by the petitioner were considered as true for purposes of trying respondent's exception at the trial court level. The peremptory exception is a well recognized procedural tool. One of the purposes of the exception of no cause of action is to allow the court to determine the issue of whether the law grants a remedy for the particular harm alleged by a plaintiff. The court, in deciding a peremptory exception of no cause of action, is deciding a purely legal question in which the court need not entertain any facts in order to reach its conclusion. As all of the petitioner's facts as alleged were accepted as true, petitioner neither suffered any harm nor lack of due process by the court's utilization of the traditionally accepted procedural tool of the peremptory exception. In fact, not only were all of the

facts of the petition accepted as true for the adjudication of the peremptory exception of no cause of action, but also all doubts were to be resolved in favor of the sufficiency of the petition. While petitioner had his day in court, he claims deprivation of due process because he has a fundamental disagreement with the procedural rules of the state of Louisiana. The petitioner's attack on the peremptory exception is analogous to an argument that Rule 12(b)(6) of the Federal Rules of Civil Procedure allowing a motion to dismiss for failure to state a claim is an infringement of due process rights. There is no valid due process argument in petitioner's assertion that his right to personal security and his due process rights were impinged by the dismissal of his claim. In fact, in *Paul v. Davis*, 424 U.S. 693 (1975), it was held that the Fourteenth Amendment does not single out an individual's reputation for special protection greater than other interests that may be protected by state law. Petitioner has not been able to demonstrate the applicability of due process arguments.

In this case, the petitioner is simply dissatisfied with the result of a court decision focusing on a purely legal issue decided by a Louisiana state court in its application of both Louisiana substantive law and procedure. Not only is petitioner's claim devoid of any federal due process validity but it is absent any recognized protected right of due process.

CONCLUSION

It is respectfully submitted that petitioner has failed to sustain his burden of establishing that this Court should take jurisdiction. Hence, the Writ of Certiorari should be denied. The matters decided by the Louisiana appellate court expressly addressed matters limited to state law and there are adequate and independent grounds. The petitioner failed to timely raise any question of federal law. Accordingly, petitioners have not demonstrated any basis on which this Court should exercise its judicial discretion and entertain this case. The petitioner's petition for a Writ of Certiorari should be denied.

Dated: June 17, 1993

Respectfully submitted,

ELENA C. GOLETZ
Counsel of Record
225 Baronne Street, 26th Floor
New Orleans, Louisiana 70112
Telephone: (504) 569-4375

MICHAEL G. THOMPSON
On the Brief

Counsel for Respondent

ATTORNEY'S NAME: Schmitt, Earl J., Jr. Esq. 10112
AND ADDRESS: 5113 Fourth Street
Marrero LA 70072

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 91-14479 DIVISION L

DOE, NORMAN
vs.
ENTERGY SERVICES, INC.

CITATION

TO: ENTERGY SERVICES, INC.
THROUGH: ITS AGENT, ELENA GOLETZ
639 LOYOLA AVE.
N. O. LA.

YOU HAVE BEEN SUED:

You must either comply with the demand contained in the petition AMENDING, a certified copy of which accompanies this citation, or file an answer or other legal pleading in the office of the Clerk of this Court, Room 402, Civil Courts Building, 421 Loyola Avenue, New Orleans, LA, within fifteen (15) days after the service hereof under penalty of default.

****

ADDITIONAL INFORMATION

Legal assistance is advisable. If you want a lawyer and can't find one, you may call the New Orleans Lawyer Referral Service at 561-8828. This Referral Service operates in conjunction with the New Orleans Bar Association. If you qualify, you may be entitled to free legal assistance through the New Orleans Legal Assistance Corp.; you may call 529-1000 for more information. COURT PERSONNEL ARE NOT PERMITTED TO GIVE LEGAL ADVICE.

****

IN WITNESS HEREOF, I have hereunto set my hand and affix the seal of The Civil District Court for the Parish of Orleans, State of LA December 4, 1992.

Clerk's Office, Room 402,
Civil Courts Building
421 Loyola Avenue
New Orleans, LA

DALE N. ATKINS, Clerk of
The Civil District Court for
the Parish of Orleans State
of LA

by /s/ [Illegible Signature]
Deputy Clerk

SHERIFF'S RETURN:
(for use of process servers only)

PERSONAL SERVICE

On this ___ day of _____ 19 ___ served a copy of the w/i petition AMENDING On ENTERGY SERVICES, INC.

_____ in person through ITS AGENT, DANE E. STAPP

Returned same day

No. _____

Deputy Sheriff of _____

Mileage: $_____

ENTERED

_____ PAPER _____ RETURN

_____ SERIAL NO. _____ DEPUTY

_____ PARISH

DOMICILIARY SERVICE

On this ___ day of _____ 19 ___ served a copy of the w/i petition AMENDING On ENTERGY SERVICES, INC.

____ through ITS AGENT, DANE E. STAPP by leaving same at the dwellinghouse, or usual place or abode, 639 LOYOLA AVE. N. O. LA. in the hands of _____ a person of suitable age and discretion residing therein as a member of the domicillary establishment, whose name and other facts connected with this service I learned by interrogating HIM/HER the said ENTERGY SERVICES, INC. ____ being absent from the domicile at time of said service.

Returned same day

No. _____

Deputy Sheriff of _____

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NORMAN DOE

VERSUS

ENTERGY SERVICES, INC.

NUMBER: 91-14479 DIV: L

FILED: _____ _____
DEPUTY CLERK

AMENDING PETITION BEFORE ANSWER SERVED

The supplemental and amending petition of Norman Doe, plaintiff in the above captioned matter, respectfully represents that the plaintiff desires to supplement and amend his original petition filed herein on August 5, 1991, in the following respects:

I[sic] By adding the following additional paragraphs following paragraph 13 to be numbered as below:

14

Petitioner has been denied the right to obtain and copy his employment records.

15

Petitioner has been denied the right to file in his employment file and/or other records of his employer, his version of any alleged wrongs.

16

Petitioner has been denied the right to have any false or "false and scandalous material s[sic]" mentioning his name removed from his employer's records.

17

Defendant has within petitioner's personnel files false conclusions or allegations of wrong doing which allegedly occurred miles away from the work site and outside the course and scope of employment of the petitioner; petitioner asks that these be removed.

18

Petitioner has been denied the right to receive notification prior to the disbursement to third parties any corporate records referencing his name.

19

Petitioner desires that the court order defendant to grant to petitioner any and all of the rights urged in the original or amended petitions.

Wherefore, petitioner, reiterating the prayer of his original petition as though set forth herein, prays that his original petition be supplemented and amended in the above particulars and that, after due proceedings had, there be judgment herein in favor of the petitioner, Norman Doe and against the defendant Entergy Services, Inc. (employer), as originally prayed for herein and additionally that

7. Petitioner is granted authority to obtain and copy his employment records.

8. Petitioner is granted authority to file in his employment file and/or other records of his employer, his version of an alleged wrong.

9. Petitioner is granted authority to have any false or "false and scandalous material s[sic]" mentioning his name removed from his employer's records.

10. Petitioner is granted authority to have removed from his employer's records any false conclusions or allegations of wrong doing which allegedly occurred miles away from the work site and outside the course and scope of employment of the petitioner.

11. Petitioner is granted authority to receive from his employer notification prior to the disbursement to third parties of any corporate records referencing his name.

12. The court order defendant to grant to petitioner any and all of the rights urged in the original or amended petitions.

Submitted by:

/s/

Earl J. Schmitt, Jr. 10112
Attorney for petitioner
5113 Fourth Street
Marrero, LA 70072
(504) 347-4959

PLEASE SERVE:

ENTERGY SERVICES, INC. THROUGH ITS AGENT FOR SERVICE:

DAN E. STAPP
639 LOYOLA AVE.
N.O., LA. 70113

CERTIFICATE

I certify that I have served a copy of the above and foregoing on the attorney for defendant by US mail this 2nd day of December, 1992.

/s/

Earl J. Schmitt, Jr.